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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. BRANDON ASAAD JAMAL QASSEM, Defendant and Appellant.	C081322 (Super. Ct. No. CM042841)

This is an appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We recount the facts and proceedings in accordance with *People v. Kelly* (2006) 40 Cal.4th 106, 110-110.

Defendant, Brandon Asaad Jamal Qassem, shared a home with his wife and three minor children (one, three, and five years of age). At approximately 10:20 a.m. on November 30, 2014, defendant was manufacturing butane honey oil (concentrated cannabis) in a building behind his home. The building was also used for the storage of

clothing, toys, furniture, and a household refrigerator, which defendant's wife accessed at least twice a day because the refrigerator in the home was broken. Defendant's two nephews, 15-year-old Frank C. (hereafter Frank) and 13-year-old Bruce C. (hereafter Bruce), were visiting and entered the building to talk to defendant. A spark from an unknown source (possibly the refrigerator motor, the hot plate, light switches, or cell phone) ignited the butane vapors, causing an explosion and fire, heavily damaging the building. Defendant, Frank, and Bruce all suffered severe burns.

On the floor of the building, detectives found an electric hot plate with shards of glass adhered to it with honey oil, a broken extraction tube, and a high concentration of butane cans. Several dozen burnt butane cans were found around the building.

In the home, detectives found 39.5 net pounds of marijuana bud on stems, 5.19 pounds of marijuana shake, and an unmeasured quantity of butane honey oil. Behind a locked door, components of a butane honey oil lab, including a vacuum purge pump were found. Smoking devices, a glass dish with honey oil in a child's stroller, marijuana bud in a child's crib, and a vaporizer pen containing a usable amount of butane honey oil were also found in the home. In the master bedroom, detectives found a locked safe (but the keys were present) containing three net grams of butane honey oil and a gun safe with two semiautomatic rifles, a pump-action shotgun, a bolt-action rifle, two revolvers, two semiautomatic handguns, syringes, and steroids. The master bathroom had been converted into a marijuana growing room containing lights, pots, soil, and dried marijuana along with children's toys and diapers.

In Frank's suitcase located in the home, detectives found marijuana-related magazines and 4.8 net ounces of marijuana bud. Frank stated he had stolen the items from a room in the home when defendant was gone and defendant's wife was sleeping. Frank claimed the room was normally kept locked but was not when he stole the items. Frank had been in the building where defendant manufactured honey oil and had seen glass containers, a hot plate, and butane. He had seen the butane honey oil in the child

stroller and the marijuana paraphernalia in the home. Frank admitted he and Bruce smoked marijuana stolen from defendant while staying at the home but without defendant's knowledge. In another suitcase marked with Frank and Bruce's last name, detectives found 5.28 net ounces of marijuana bud and a glass smoking device. Bruce also admitted stealing marijuana and smoking devices from the (normally) locked room but denied smoking marijuana. Bruce had seen marijuana on the floor of the building when retrieving items from the refrigerator.

Frank and Bruce both explained they had gone into the building to ask defendant when they were leaving to go home. Defendant told them he was finishing up and they would leave when he was done. Defendant turned around and there was fire everywhere.

In a vehicle driven by defendant's wife, detectives found a broken marijuana smoking device, a vaporizer pen containing a usable amount of butane honey oil, and $4,219 in cash. Neither defendant nor his wife was employed. Defendant's wife claimed defendant sold marijuana to dispensaries.

In defendant's truck, detectives found a tax return showing defendant claimed $8,118 in compensation from a marijuana collective which had been closed, a vacuum pump and extraction tube used in manufacturing butane honey oil, 0.8 net ounces of marijuana, and paperwork showing defendant had his butane honey oil tested for potency (THC content of 63.89 percent).

According to Frank and Bruce's mother, Frank suffered second and third degree burns over 45 percent of his body and Bruce suffered second and third degree burns over 60 percent of his body. Frank was hospitalized for two and one-half months and Bruce was hospitalized for four months, both in ICU for at least two months. They had numerous surgeries and skin grafts including skin grafts on their faces. They would need additional surgeries as they grew out of the skin grafts. Neither Frank nor Bruce could open his mouth as wide as before they were burned, which affected their ability to eat. Frank and Bruce were behind in school and no longer played sports.

Defendant entered a negotiated plea of guilty to manufacturing a controlled substance, to wit, concentrated cannabis (butane honey oil) (Health & Saf. Code, § 11379.6, subd. (a); count 5) and, in connection with the offense, admitted a single allegation that he personally inflicted great bodily injury upon Frank and Bruce (Pen. Code, § 12022.7, subd. (a)). Defendant also pleaded guilty to two counts of child endangerment (Pen. Code, § 273a, subd. (a); counts 3 [Frank] and 4 [Bruce]). In exchange, the remaining counts (possession of marijuana for sale, another count of child endangerment (defendant's one-year-old child), and two counts of recklessly causing a fire with great bodily injury) and allegations (great bodily injury enhancements in connection with counts 3 and 4) were dismissed with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

The court sentenced defendant to state prison for an aggregate term of 10 years eight months, that is, the midterm of five years for count 5, a consecutive three-year term for the great bodily injury enhancement, and consecutive one-third the midterms or one year four months each for counts 3 and 4.[1]

Defendant appeals.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed a supplemental brief, contending the trial court erroneously found in aggravation that Frank and Bruce were particularly vulnerable and that the crime caused great bodily harm. He also contends the trial court failed to state reasons for

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[1] In response to defense appellate counsel's letter, the trial court corrected the abstract of judgment to reflect the oral pronouncement of judgment.

imposing consecutive terms. Anticipating we will find his claims forfeited for failure to object, defendant contends counsel rendered ineffective assistance of counsel. We reject defendant's claim of ineffective assistance of counsel and affirm.

Background

The probation officer recommended the court deny probation and impose an aggregate term of 12 years eight months. The probation officer reported the following. Defendant had no record of committing similar crimes or crimes of violence and had been free of violations and custody for a substantial period of time, having had two prior misdemeanor convictions, the last occurring eight years prior. Defendant would experience restrictions with his first felony convictions. Defendant appeared remorseful, was willing to comply with probation, and wanted to regain custody of his children who would be impacted by the loss of his emotional and financial support. He had been unemployed for three years due to an injury sustained in a car accident and received SSI.

The probation officer considered the circumstances of the current offense more egregious than other instances of the same crime. Defendant manufactured butane honey oil indoors near several ignition sources and the lab exploded in the presence of minors who suffered severe burns and will suffer long-term ramifications. The probation officer stated the victims were particularly vulnerable, having been in their paternal uncle's home where they could expect to be safe and protected. The probation officer believed defendant's actions suggested criminal sophistication. He studied the manufacturing process online, possessed tools to purify the oil, he " 'donat[ed]' " honey oil to a dispensary but received payment according to his tax returns, and he had his honey oil tested for purity and potency. In recommending the upper term for all offenses, the probation officer cited: the victims' particular vulnerability; defendant's criminal sophistication; the crime involved damage of great monetary value; there was a significant amount of contraband; and defendant's criminal conduct was increasing in

severity. In mitigation, the probation officer cited defendant's minimal prior criminal record.

At sentencing, the court stated it intended to deny probation and impose the midterm for the offenses. Defense counsel sought probation for "a terrible accident," claiming: defendant did not know his nephews were still present in the home the day of the explosion and no one resided in the building; defendant learned from the Internet how to make his medicine "at a fraction of the cost"; he did not know how explosive butane gas is; defendant wished to continue to cooperate with fire officials on a service video to educate the community about the consequences; and defendant was remorseful.

The prosecutor agreed with probation's recommendation of the upper term, arguing defendant "benefited significantly by not having to plead to Penal Code [section] 452," which requires arson registration; the Legislature recently passed a law allowing the court to consider as an aggravating factor the presence of children within 300 feet of someone manufacturing butane honey oil[2]; defendant's manufacturing conduct had been "going on for quite some time"; the victims faced "tragic futures"; defendant's operation was "ongoing, very sophisticated, [with] a large amount of butane honey oil, finished product in the home"; and he was manufacturing in a building with the only operable

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[2] Health and Safety Code section 11379.6 was amended (Stats. 2015, ch. 141, § 1) to provide:

"(d) The fact that a violation of this section involving the use of a volatile solvent to chemically extract concentrated cannabis occurred within 300 feet of an occupied residence or any structure where another person was present at the time the offense was committed may be considered a factor in aggravation by the sentencing court."

The amendment was effective January 1, 2016, after defendant committed his offense. It is arguable whether the particular factor set forth in subdivision (d) could be applied to defendant without violating ex post facto prohibitions. (See *People v. High* (2004) 119 Cal.App.4th 1192, 1195-1196.) In any event, this factor was not relied upon by the trial court.

refrigerator and used by the family on the premises and in "very close proximity" where his three children and two nephews had been staying. The prosecutor stated the mother of the victims believed defendant should receive the upper term.

Defense counsel reiterated defendant believed no one was present and that he thought what he was doing was safe.

The court determined the case did not meet any of the criteria for an unusual case finding for probation and, in any event, probation would be denied due to the nature, seriousness, and the circumstances of the case. The court chose midterm sentences, concluding, on balance, the circumstances in aggravation did not outweigh those in mitigation. In aggravation, the court found the offense "caused great bodily harm," the "victims were particularly vulnerable," and the "manner in which the crime was committed indicates planning, sophistication or professionalism." In mitigation, the court found that defendant had an insignificant prior criminal history, his prior performance on probation was satisfactory, and he was remorseful. The court chose the midterm of five years for count 5, a consecutive one-third the midterm or one year four months for count 3, "imposing a consecutive sentence by reason of the repetitive nature of the offense committed," a consecutive one-third the midterm or one year four months for count 4, noting again the repetitive nature of the offense, and three years for the great bodily injury enhancement, "all to run consecutive with each other, for a total aggregate sentence of ten years and eight months." Defense counsel did not object to the sentence imposed.

Analysis

"[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 356 (*Scott*); see also *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1292.) "Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating,

and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Scott, supra,* at p. 353.)

Here, defense counsel did not object to the aggravating factors or the trial court's reason for imposing consecutive sentences. Although defendant's claims are forfeited, we review defendant's claim that counsel rendered ineffective assistance in failing to object.

To establish ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693-694, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "Counsel's failure to make a meritless objection does not constitute deficient performance." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1080; *People v. Anderson* (2001) 25 Cal.4th 543, 587.)

Defendant contends counsel's performance was deficient in failing to object to the trial court's failure to state reasons for imposing consecutive sentences for counts 3 and 4. Defense counsel's performance was not deficient because the trial court did state a reason for imposing consecutive terms for counts 3 and 4, that is, the repetitive nature of the offense. Defendant does not challenge that finding. In any event, we agree that defendant's conduct was ongoing as it was clear from the evidence collected from his manufacturing operation that he repeatedly exposed Frank and Bruce during their stay in his home to marijuana and marijuana cultivation in addition to butane honey oil and the dangers of manufacturing the same.

Defendant contends counsel's performance was deficient in failing to object to two of the three factors used in aggravation, which were either an element of the offense (Pen. Code, § 273a, subd. (a) [child endangerment]—victim vulnerability) or a fact of the enhancement (Pen. Code, § 12022.7, subd. (a) [infliction of great bodily injury]—great bodily harm). Defendant argues there was no tactical reason for defense counsel's failure

to object. Defendant claims the failure to object was not harmless because one factor in aggravation remains and there are several factors in mitigation. We conclude that any objection would have been meritless.

A finding of victim vulnerability based solely on age where age is an element of the offense would be dual use of a fact. (Cal. Rules of Court, rule 4.420(d) ["[a] fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term"]; see *People v. Flores* (1981) 115 Cal.App.3d 924, 927.) Although victim vulnerability is not an element of manufacturing butane honey oil, the child abuse/endangerment law was enacted to protect a vulnerable class, children. (Pen. Code, § 273a, subd. (a); *People v. Toney* (1999) 76 Cal.App.4th 618, 622.)[3]

Here, the trial court found in aggravation the victims were "particularly" vulnerable. As noted in the probation report, this factor focused not on the victims' ages but on their relationship with defendant and his position of trust. They were staying at their paternal uncle's (defendant's) home where they could reasonably believe they would be safe and protected. Further, defendant manufactured the butane honey oil not far from where his nephews (Frank and Bruce) slept. The trial court properly found the victims were particularly vulnerable and an objection by defense counsel would have been meritless.

The trial court found in aggravation that the offense caused great bodily harm. "[Penal Code s]ection 273a does not focus upon actual injury produced by abusive

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[3] Penal Code section 273a, subdivision (a) provides: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years."

actions but 'rather upon whether or not the attendant circumstances make great bodily injury likely. Occurrence of great bodily injury is not an element of the offense.' [Citation.] It is the likelihood of foreseeable injury, rather than whether such injury in fact occurs, that is relevant. [Citation.] The statute is intended to protect children from situations in which the 'probability of serious injury is great.' [Citation.]" (*People v. Lee* (1991) 234 Cal.App.3d 1214, 1220.) Thus, great bodily harm was not an element of child endangerment. Defendant was convicted of and sentenced on two counts, one for each victim. The trial court properly cited this factor in connection with counts 3 and 4.

In connection with count 5, defendant admitted a single allegation of great bodily injury (Pen. Code, § 12022.7, subd. (a)), which involved both Frank and Bruce. The trial court's use of great bodily harm as an aggravating factor was not a prohibited dual use of a fact of an enhancement under the circumstances here. (Cal. Rules of Court, rule 4.420(c).)[4] The trial court selected the midterm, not the upper term as had been recommended by probation and the prosecutor. " '[G]reat bodily injury' " means "a significant or substantial physical injury." (Pen. Code, § 12022.7, subd. (f).) The victims suffered more than just the painful, disfiguring physical injury of severe burns caused by defendant's manufacturing of butane honey oil and the explosion. The victims face lifetimes of grief and pain, including additional surgeries and skin grafts. As their mother reported, neither Frank nor Bruce could open his mouth as wide as before, which affected their ability to eat, they were behind in school, and they no longer played sports. The trial court properly considered the harm to these two victims, which was above and

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[4] California Rules of Court, rule 4.420(c) provides: "To comply with [Penal Code] section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term."

beyond the "great bodily injury" caused by defendant's conduct of manufacturing butane honey oil and defense counsel was not required to make a meritless objection.

In any event, any error was clearly harmless. It is not reasonably probable the low term for the offenses would have been selected had counsel objected. (*People v. Fosselman* (1983) 33 Cal.3d 572, 584.) Two of the factors in mitigation related to the same thing, defendant's criminal history (insignificant prior record and his satisfactory performance on probation). Any mitigating advantage of having a minimal misdemeanor record was diminished by the severity of the current crime. The other factor in mitigation, defendant's remorse, was also found. Against these factors, the trial court legitimately found in aggravation the victims were "particularly vulnerable" and the "manner in which the crime was committed indicates planning, sophistication or professionalism." As the probation officer stated, defendant's actions suggested criminal sophistication. He studied the manufacturing process online and possessed tools to purify the oil. He " 'donat[ed]' " honey oil to a dispensary but received payment according to his tax returns. He had his honey oil tested for purity and potency. Defendant's manufacturing process had been ongoing considering the amount of contraband found and his tax return. There were a multitude of other factors the trial court could have found to weigh against the mitigating factors had defense counsel objected. Several offenses were dismissed with a *Harvey* waiver, including possession of marijuana for sale, two counts of arson with great bodily injury, and another count of child endangerment involving defendant's own one-year-old child, as well as two additional great bodily injury enhancements (in connection with counts 3 and 4). Defendant possessed a substantial amount of contraband. His manufacturing offense caused substantial property damage. The trial court cited the nature, seriousness, and circumstances of the offenses as the reason for denying probation, a factor the court could cite in imposing sentence as well. (*Scott, supra,* 9 Cal.4th at p. 350, fn. 12.) Defendant has failed to establish ineffective assistance of counsel.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

DUARTE, J.

RENNER, J.